

19 March 2008

PO BOX 12-603,  
WELLINGTON.  
rossdfrancis@gmail.com

Dear Rick Barker,

My name is Ross Francis. I refer to your letter of 14 March 2008 in response to my email to you of February 10 and my letter to the Justice Minister of 30 November 2007.

Unfortunately, your response contains several errors. I propose to draw your attention to these. I also intend to explain why there ought to be a commission of inquiry, or an inquiry of some description, into the case.

- 1) You say that the Ellis case has “received extensive scrutiny...”. You would realise if you had read my research articles that the case has not received anywhere near the scrutiny that it deserves. For example, it appears that of the seven Court of Appeal judges that assessed Ellis’ two appeals, none viewed the children’s evidential interviews. The reviews of Drs Barry Parsonson and Michael Lamb – deemed to be beyond the scope of the appeals court – have never been tested. Curiously, officials didn’t believe that the opinions of Parsonson or Lamb were worthy of inclusion in the ministerial inquiry’s terms of reference. In addition, Sir Thomas Thorp’s review, which raised concerns about some of the evidence adduced at trial, was also excluded from Sir Thomas Eichelbaum’s terms of reference. The ministerial inquiry did not traverse all aspects of the case, but focused on the complainants’ evidential interviews.
- 2) You assert that Sir Thomas Eichelbaum was advised by two experts, “who expressed the same overall conclusions about the case”. If you had read my research articles you would realise that the two experts did not reach the same overall conclusions. Prof. Graham Davies argued that the children’s age and the historic nature of their claims meant that they were unable to provide:

*detailed and spontaneous accounts which are so useful from the point of view of making judgements on reliability... we cannot and should not expect a vivid and detailed account in these circumstances and nor in general do we get one from any of the children.*

Prof. Davies wanted Sir Thomas to carry out reality checks on the children’s claims. There were questions pertaining to corroboration which Davies was unable to answer. These questions, he wrote, would need to be addressed

by “the wider inquiry”. If Davies had been given a copy of Sir Thomas Thorp’s review, he would have realised that the children’s claims could not be corroborated. Thorp observed that “where one child claimed to have seen serious abuse being committed on another, the second child denied any such happening”.

- 3) You assert that Sir Thomas’ report “placed significant weight on the opinion of Professor Davies”. That, too, is false. Sir Thomas was highly selective regarding the weight he gave to Prof. Davies’ opinion. For instance, Prof. Davies seemed to doubt that any sexual abuse had taken place away from the Civic Creche. He wrote:

*All the children reviewed chose to tell about events at the creche in their first interviews and some, when asked, explicitly denied that Mr Ellis had done anything untoward on any walks or visits outside of the creche. Virtually all the allegations concerning events outside the creche emerged in later interviews, often after considerable delay.*

Sir Thomas, however, dismissed Davies’ conclusion regarding this issue.

Prof. Davies also criticised the extensive use of direct questions and the number of interviews which the children underwent. Regarding child X (aka Tommy Bander), Prof. Davies wrote:

*[His] later videos show a gradual spiral into more elaborate allegations embracing a wider and wider circle of helpers and teachers at the creche. A child may disclose more information over a number of interviews as trust is established between interviewer and child and the effect of any threats or prohibitions made by the abusers weaken. However, such elaboration may have other causes of the kind highlighted in the earlier sections: repeated requests to recall may lead to construction of nonfactual accounts, with the young child unable to distinguish between their retrieved memories, self-generated imagery and content derived from other, later sources. ... Some themes from his earlier videos reappear in the later ones: the grey car; the burning paper and sticks up bums; strangers who hurt children. The only new themes concern the ‘circle game’, the presence of secret passageways and the hanging of children in cages from the ceiling. Clearly, the police investigation explored carefully the creche and other named properties with these allegations in mind and certain traps and air spaces were found at 404 Hereford Street and the creche. This might be construed as broadly consistent with some of X’s allegations, but no forensic links could be established between these areas and Mr Ellis or the children involved. Other explanations need also to be considered. Secret passageways are the stuff of children’s fiction (interestingly, they also figured in the testimony of children in the McMartin case, referred to earlier) and cages containing children might reasonably be traced to a similar origin.*

Below is another excerpt from Prof. Davies’ report. It concerns child R:

*The allegations that R makes in this late interview have clear parallels with those made by X. Such a parallelism is either independent corroboration, an example of contamination or elements of both: only careful scrutiny of the timing of the interviews and contacts between the families will answer this*

*question. Certainly, in both X and R's account, there are some implausible elements (the claims about the sticks; keeping them in his anus all day). .... It is not clear, why X or R left matters so late before describing the alleged incidents involving groups of adults. According to their earlier accounts, they had both been threatened by Peter about what would happen if they told - and both told the interviewer about this at an early stage. What motive could there be for such delayed disclosure? In these circumstances - and in the absence of an alternative explanation or external validation - there is a very real risk that large elements of the incident involving adults could be unreliable, driven by repeated requests to recall, the negative stereotyping of Mr Ellis, the conflation of separate and unrelated events and the sharing of information between families. Despite quite intensive questioning, R fails to produce many features of accurate accounts as reflected in CBCA criteria: there is a lack of spontaneous or distinctive detail, other than that elicited from focused questions. The events seem to occur in some parallel universe, divorced from the known routine of the creche. As mentioned elsewhere, the most reliable accounts from young children tend to be those which occur early on, before the opportunities for elaboration and contamination of the kind mentioned above have had the opportunity to occur.*

Prof. Davies seemed to have serious concerns about the accuracy of X's and R's claims. Sir Thomas, however, ignored these concerns, which, in addition to his appointment of Dr Louise Sas, suggests that his conclusions may have been pre-determined.

In the first excerpt, Prof. Davies stated that other explanations needed to be considered. What evidence is there that police, when assessing the children's evidence, considered other alternatives? Detective Colin Eade wrote in a police report in March 1992 that there was a "feeling" that Ellis had been sexually abusing children. The abuse had occurred "under the noses of so called professionals over a long period of time...this offending is of a type that is unheard of in New Zealand." These comments were made *prior* to Ellis' arrest and many months before police concluded their investigation. Don't they indicate that other explanations were unlikely to have been considered?

- 4) You assert that Sir Thomas Eichelbaum made "independent inquiries" as to his selection of experts. Again, if you had read my research articles you would realise that that is false. It was Val Sim, who in 1998 claimed that the prosecution's case had been "rigorously tested" and who in 1999 opposed the setting up of a commission of inquiry into the case, who conducted inquiries into what experts Sir Thomas should and should not appoint. She advised Sir Thomas to reject three of the world's leading experts on children's testimony and anybody who had a "close publishing association" with these experts. She apparently advised Sir Thomas that Dr Sas had "high standing". Dr Sas, unlike several other experts who have been involved with the Ellis case, has published no research into the interviewing of children. Dr Debra Poole, one of the world's leading experts on children's testimony, has advised me that she has not heard of Dr Sas.

Val Sim advised Sir Thomas to talk to US law professor Thomas Lyon. Prof. Lyon's views on child sexual abuse sit squarely outside the professional

mainstream and have been the subject of strong academic criticism. Dr Poole does not endorse them:

*I have issues with Lyon's reading of the literature, how he slants it, and what he is willing to cite to make his points. I doubt you'll find him talking to people on both sides of the debate. (private communication)*

I assume that Ms Sim was aware of Prof. Lyon's position, and it was this position which presumably convinced her that Sir Thomas should confer with Prof. Lyon.

The Law Commission is likely to recommend, within a matter of weeks, that all future public inquiries be administered by the Department of Internal Affairs (unless that department is the subject of any inquiry). It is also expected to recommend that parliamentary legal counsel should draft each inquiry's terms of reference. These proposals, says Commissioner Helen Aikman, "should overcome any perceptions of a conflict of interest".

- 5) You assert that Mrs Ablett Kerr is currently processing a petition to seek leave to appeal to the Privy Council. My understanding is that Mrs Ablett Kerr wrote to the Justice Minister in January seeking a meeting. I presume that she wishes to explain to the Minister why a commission of inquiry should be set up. She recently told National Radio listeners that an appeal to the Privy Council would not satisfy doubts about the case:

*...if we win, as I suspect that we would, then at the end of the day we're still going to have to have a commission of inquiry of some kind, because a Privy Council appeal will not answer the questions about what happened at the Christchurch Civic Creche and how on earth we got into this situation. (Radio NZ, Checkpoint, January 29, 2008)*

During the same interview, Mrs Ablett Kerr complained that she had had difficulties obtaining the necessary funding to proceed with an appeal to the Privy Council. Such an appeal appears some time off, if one ever eventuates.

You agree with the view that a commission of inquiry would be unlikely to reach a better view of the facts than was reached at trial. Tim Barnett, the Justice and Electoral committee chairman who recommended against establishing a commission of inquiry, has admitted that his committee dealt with many other matters and met for only three hours a week. The committee failed to read the reviews of Drs Parsonson or Lamb, and did not traverse Sir Thomas Thorp's report. MPs questioned petitioners for little more than an hour. Memory expert and Innocence Project co-founder Maryanne Garry explained that memory is a reconstructive process.

*As adults, our memories are extremely fragile and open to corruption and distortion, and children have these tendencies exaggerated for a number of social and developmental reasons that adults themselves don't have.*

Although the complainants might wish to appear before a commission of inquiry, Garry believed that their participation could be problematic. She argued that their memories were likely to have been distorted at the time of the police investigation. The former children would be unlikely to see their evidence “in a new light...they would still be reporting what they believed...[but] it doesn't mean it's accurate”, she said.

- 6) Below is a brief description of some highly questionable aspects of Ellis' trial:

Essentially, Ellis was convicted on the basis of uncorroborated testimony of young children. Selective portions of videotaped interviews with the complainants were played to jurors. As a result of Justice Neil Williamson's rulings, many relevant portions were not played. At two subsequent appeal hearings, Ellis' legal counsel argued that the defence was prevented from cross-examining or leading evidence on matters which went to the heart of the children's credibility (and reliability). In his 1999 report into the case, retired High Court judge Sir Thomas Thorp wrote:

*There is in my view some merit in the Petitioner's argument that "the jury had to see that the children were capable of outrageous and fanciful allegation".*

Not only was Mr Ellis disadvantaged by the fact that the jury did not see and hear what the children were capable of saying, but he was further disadvantaged by the prejudicial and selective testimony of the prosecution's expert witness, Dr Karen Zelas. Dr Zelas was permitted, under section 23G of the Evidence Act 1989, to tell jurors that the children's behaviour was “consistent with sexual abuse”. While being cross-examined she claimed that a fear of spiders and insects “may be consistent with child sexual abuse.” When she was asked what behaviour was inconsistent with sexual abuse, she replied: “I haven't thought about that”. (She subsequently testified that “there are not very many behavioural features one could say were totally inconsistent”.) The fact is that there are no childhood behaviours specific to abuse. Non-abused children can display the same behaviours that abused children display. However, in the late '80s and early '90s, it was widely believed that sexual abuse could be diagnosed on the basis of children's behaviour. The new Evidence Act 2006, which has removed section 23G, allows an expert witness to testify as long as their testimony is “helpful”. It is difficult to see how Dr Zelas' testimony would meet that criterion.

It is likely that Dr Zelas' testimony conveyed to jurors that the children had probably been sexually abused. Indeed, on more than one occasion she strongly hinted at that conclusion. For example, in relation to child X (aka Tommy Bander) she said that the association of his “more severe [behavioural] symptoms with his disclosures of sexual abuse appears to link them quite closely with a specific matter that does relate to child sexual abuse rather than to other life events in the child.”

Dr Zelas did not tell jurors the whole story. On 22 March 1993, prior to Ellis' trial, she supplied the Crown Prosecutor with a 19-page affidavit. She focused on the evidence of Tommy Bander. In her affidavit, Dr Zelas wrote that Tommy had behavioural and emotional problems:

*It is not surprising that such symptoms would increase in intensity and/or new ones develop when a child was being placed under emotional pressure by the parents ... [i]t is not surprising, given his parents' persistent questioning, that his behavioural and emotional symptoms intensified ... I accept that Tommy has various mental health problems which have worsened since the first evidential interview ... I agree that Tommy is likely to have wanted his mother to stop questioning him.*

Dr Zelas also noted that: "From the point of view of the Creche Inquiry, the investigation of Tommy's circumstances were considered complete after his first interview ... I accept that the account of incidents described by Tommy in his first interview could be consistent with 'a cleaning up procedure'". Why, then, was he interviewed again, months later? According to Dr Zelas, it was all down to his parents. It was "hard to believe", she wrote, that they would have "accepted an opinion that Tommy had not been abused". Remarkably, it seems the insistence by Tommy's parents that their son had been abused resulted in Tommy undergoing a further four evidential interviews. It was during these four interviews that four charges were laid against Ellis, who was convicted on all four counts.

What is significant about Dr Zelas' comments is that the jury did not hear them. An expert witness has a duty to assist the Court impartially on relevant matters within the expert's area of expertise and knowledge. It is apparent that Dr Zelas behaved unethically in refraining from disclosing to the jury relevant information concerning Tommy Bander (and possibly other complainants). She appears also to have perjured herself. She was cross-examined as to whether she formed a view that Tommy was possibly suffering from mental illness during his evidential interviews. "No, I did not", she replied. That is clearly false. She advised the Crown Prosecutor (pre-trial) that "Tommy has various mental health problems which have worsened since the first evidential interview".

When Dr Keith Le Page, the defence expert witness, explained that childhood behaviours referred to by Dr Zelas were not diagnostic of abuse, the Judge ruled that such testimony was inadmissible. Ironically, such testimony would, under the Evidence Act 2006, almost certainly be regarded as helpful. There are no behaviours on which sexual abuse can be diagnosed. In addition, the research literature suggests that diagnosis of child sexual abuse is beyond the expertise of mental health professionals.

Jurors possibly weren't aware of the striking similarities between the Ellis case and similar cases overseas. In his 1999 report, Sir Thomas Thorp stated:

*The trial record shows that at no stage was the Court advised that "multiple allegation creche cases" had special characteristics which called for special*

*care and examination. As the case appears to have been the first of its kind in New Zealand that is understandable.*

Thorp also stated that if the view, expressed by Prof. Ceci and Justice Wood, that “special hazards” arising from mass allegation creche cases proved to have substantial support, “it would in my view be difficult to argue against the existence of a serious doubt about the safety of [Ellis’] convictions.” I suggest that support for Ceci’s and Wood’s position is widespread.

Jurors at Ellis’ trial were denied the opportunity to hear from some key witnesses. The child who made the allegation that sparked the investigation into the Civic Creche did not testify. He evidently did not make any allegations of abuse when formally questioned. His mother, who allegedly has a history of mental illness, also did not testify. Jurors did not learn that the boy was taken from the Civic and, at his new creche, reportedly made an allegation of sexual abuse against a male creche worker. That allegation, however, was apparently accorded little credence.

Jurors were not given the opportunity to hear from children who had been interviewed and who did not disclose abuse. Indeed, the vast majority of children who were interviewed failed to disclose. Last year, while undertaking my research into the Ellis case, a John Doe wrote to me. He claimed that he had been interviewed as part of the original police investigation. He said his interview was “so wrong”. (his emphasis) The interviewers, he alleged, produced a doll “and they were like ‘did he touch you here?’ (pointing at the doles (sic) crotch) ... I felt like I had done something wrong.” He said that Ellis was his “favourite” caregiver. “He was a champion!” I would not be surprised if there were many more comments like these from former children who were interviewed by police and/or specialist interviewers. Their voices, like those of the alleged victims, ought to be heard.

In the circumstances, I believe that a commission of inquiry would reach a much better view of the facts than was reached at trial. The commissioner(s) would presumably hear and see relevant evidence that was not adduced at trial. They might be expected to hear about the problems associated with Dr Zelas’ testimony, much of which was unhelpful and prejudicial. They presumably would have at their disposal opinions from some of the world’s top experts on children’s testimony, expert opinion evidence which was not proffered at the time.

- 7) Earlier this year Mrs Ablett Kerr publicly criticised Sir Thomas Eichelbaum’s inquiry. “What we now know”, she said, “is that that ministerial inquiry, which was supposed to be the answer to the concerns about the Ellis case, in fact it doesn’t stand up to scrutiny” (emphasis in original). She added that Professor Harlene Hayne’s recent findings contradicted Sir Thomas’ conclusions. Mrs Ablett Kerr stressed that Professor Hayne’s findings, unlike those of the ministerial inquiry, were based on science – not opinion. Prof. Hayne found that the evidential interviews did not meet best practice

guidelines of the time. She found that the interviewers sometimes “failed to comply with even the most fundamental guidelines”. The questions posed were not substantially better than those posed in the notorious Kelly Michaels case. Michaels’ convictions were quashed because, among other reasons, the formal questioning of the complainants was so suggestive as to render their testimony unreliable.

Recently, retired High Court judge Sir Thomas Thorp took the highly unusual step of publicly criticising the government and the Justice Ministry. He claimed that my research, which he has read, “must add to concerns expressed previously that [the] case may have gone awry” (NZ Herald, January 12, 2008). He opined that an independent tribunal to enquire into potential miscarriages of justice – a body whose establishment he supports – would not be set up under the current government, apparently because of opposition from a “turf-conscious” Justice Ministry. In 2005, Tim Barnett’s Justice and Electoral committee recommended that an independent tribunal be set up.

8) The Ministry of Justice has responded to questions listed in my letter of 30 November 2007. However, the Ministry has refused to answer many of my questions. That is not surprising, given that some of them required the Minister’s input. I hope you will address the questions below:

- In the interests of justice, will you seriously consider subjecting Dr Sas’ report to peer-review?
- Why have Michael Lamb’s and Barry Parsonson’s expert opinions, which the Court of Appeal said were beyond its scope, never been tested?
- Do you believe that the recent findings of Professor Harlene Hayne raise the possibility that Mr Ellis may have suffered a miscarriage of justice?
- What new evidence (if any) would you require before you entertained the possibility of re-opening the Ellis case?

9) I have enclosed with this letter Dr Michael Lamb’s conclusions in regard to this case. I suspect that you have not read them. Dr Lamb was given access to, among other evidence, transcripts and videotapes of the children’s evidential interviews. I have also attached a copy of his qualifications at the time that he wrote his affidavit (April, 1999). Prof. Maggie Bruck, one of the leading experts on children’s testimony, has endorsed his conclusions.

Dr Lamb is possibly the leading authority on the interviewing of child abuse victims. The Cambridge University professor has published numerous articles in scientific peer-reviewed journals. In 1998, he and Dr Debra Poole wrote *Investigative interviews of children: A guide for helping professionals*. The book’s intended readers were police, social



workers and forensic interviewers, whom Lamb has advised and trained. Its guidelines have been cited by experts testifying in Court and have become the standard in several countries, including our own. In 2004, the American Psychological Society presented Lamb with a lifetime contribution award. The society said that his work had “fundamentally advanced the interests of young children and their families”; it called him a scientist and scholar of “the highest integrity”.

The flaws in Ellis’ trial, the failure of the appeals court to address the expert opinion evidence, and the recent findings of Prof. Hayne raise serious doubts about the safety of Peter Ellis’ convictions. I believe that an inquiry of some description needs to be set up in order to lay the case to rest. However, whilst finality is a most desirable goal, justice is even better. I sincerely hope that you are willing to look at the case with fresh eyes.

I’d be happy to answer any questions you may have regarding this letter.

Yours sincerely

Ross Francis